PART TWO

STATEMENT OF FACTS

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 25

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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PART TWO.

STATEMENT OF FACTS.

If it were necessary, in order to sustain the order of the Court below vacating the Commission's "Cease and Desist Order", to examine the unnecessarily extensive record amassed in the Trade Commission proceedings, the task would be simplified by the thorough and dependable analysis of the entire record made by the writer of the opinion below. It would not seem necessary to supplement that masterly ac-

complishment. However, all of the facts of record that are essential to a sound and complete understanding of the origin, development and the true nature of the marketing methods of the Portland Cement Industry can be reduced to about three score pages with apt supporting references to the evidentiary record, the exhibits and the names of witnesses and whether they were presented by the Commission or Respondents.

These facts are not complex; they are simple. They are not involved in controversy; they are admitted and in many instances appear as actual quotations from statements made by the Trade Commission. They demonstrate clearly the lack of any foundation for the charge of combination in restraint of trade and the order restraining such theoretical combination. The simple story only adds to the proof of the Commission's entire proceedings being unwarranted and contrary to the public interest. They are a complete answer to Petitioner's brief on the "merits."

THE INDUSTRY—ITS TRADE CUSTOMS.

The following statements of fact relating to the nature of the industry and to the development of the methods of marketing are based only upon official statements by the Commission, statements made by Counsel for the Commission in the course of the trial, the testimony of the Commission's own witnesses, and the Commission's exhibits. They are submitted to the Court as not being controverted by the Commission—actually as statements vouched for by the Com-

mission, and, therefore, not subject to contradiction in the Commission's "Findings as to the Facts."

The official statements by the Commission are quoted from two reports made by the Commission, concerning pricing methods in the Cement Industry. The first report was made by the Commission after four years of investigation of the pricing methods of the Cement Industry, on the Commission's own initiative. It was issued in March, 1932, under the title "Basing-Point Formula and Cement Prices." The second was issued in response to a resolution of the United States Senate of February 16, 1931, directing the Commission to investigate competitive conditions in the Cement Industry and to report the facts with respect to the sale and distribution of cement and "whether the activities in the Cement Industry on the part of trade associations, manufacturers of cement, or dealers in cement constitute a violation of the antitrust laws of the United States, and whether such activities constitute unfair trade practices." This was entitled "Cement Industry" and was issued in June, 1933, and known as Senate Document No. 71.

Before the Commission, these two documents were offered in evidence by Marquette as Marquette's Exhibits 16 and 17 respectively.[40]

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[40] Attention is directed to a statement of the Trial Examiner as follows: "The Commission takes judicial notice of Senate Document No. 71" (which is Marquette's Exhibit 17). Tr. 19,674, R. 6,197-8; Tr. 19,724-5, R. 6,216; Tr. 19,732, R. 6,220.

Nature of the Commodity Involved.

Cement is a perishable, finely powdered material, used as a component in the fabrication of concrete blocks, tile and similar products, and for making concrete for construction of buildings, foundations, roads, bridges, dams and other monumental works. (Commission's Witness Adm. Peoples, Tr. 9,986, R. 3,646.) It is sold in competition with numerous other construction materials.

"Cement is a standard commodity, made in standardized specifications, not differing substantially among producers in quality except as between recognized and standardized grades thereof."[41]

"Standard portland cement is an example of a commodity that not only can be closely graded and accurately tested for quality, but is practically uniform in quality for all producers. While there are brands, as there are in sugar and salt, upon which extensive advertising campaigns are based, * * * it is generally true of the product that for all common purposes cement is cement and it matters little to the consumer whose product is purchased, provided price and other terms of sale are alike. Dealers are also on record * * * that there is no substantial difference between the brands of standard portland cement,

[41] The Complaint, Par. THREE, R. 41; Commission's Witnesses: Rice, U. S. War Dept., Tr. 1,737, R. 1,089; Ashley, Tr. 5,470, R. 2,287-8; Adm. Peoples, Procurement Dept., Tr. 10,324, R. 3,757-8; Vogel, highway contractor, Tr. 11,731, R. 4,185.

or if there is a difference, it is so slight that no brand can be sold at a premium over another." (Statement by Commission, Marq. Ex. 16, pp. 28-29.)

Demand for Cement.

The demand for cement depends upon the general demand for building materials. The demand not only fluctuates from time to time but varies from place to place.[42]

From 1920 to 1929 the industry showed sharply increasing demand. (Counsel for Commission, Tr. 37,179, R. 11,248.) Production of cement in the years from 1928 to 1932 showed a decline of 54%. Persons employed in the industry declined from 43,244 in 1928 to 11,941 in February, 1933, a decline of 68.8%. (Hugh S. Johnson, Administrator, N. R. A., Commission's Ex. 557.)[43]

In 1928 production reached its peak at 176,298,846 barrels. In 1933 production was 64,000,000 barrels. In 1936 production had again increased to 112,396,000 barrels and shipments to 112,566,000 barrels. These quantities were above the 100,000,000 barrel mark for the first time since 1931 and represented a gain of 46% in production and 50% in shipments over 1935. Prices generally in 1936 as compared to 1935 were unchanged.[44] (Commission's Ex. 3.)

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[42] Counsel for Commission, Tr. 37,196, R. 11,250; Commission's Witness Sunderland, Tr. 13,597, R. 4,722-3.

[43] Also see Complaint Par. Three, R. 41.

[44] "The recent trend of production has been strongly upward" (The Complaint Par. Three, R. 41) c.f. Complaint, Par. Nine (2), R. 201.

Distribution—The Function of the Building Material Dealer.

By reason of the nature of the product it is distributed principally through building material dealers. The building material dealer is the backbone of the cement industry.[45]

The main part of the manufacturer's business is done through the dealer. The business through the dealer is diversified business and is "more substantial" for that reason. It goes through many small sources and does not subject the manufacturer to violent reactions in the matter of quantity as between one year and another. (Statement by the Examiner, Tr. 28,572, R. 8,449.) The dealer performs special, valuable services in merchandising cement.[46]

Under the temporary Government relief program to increase employment during the recent depression, the Government, through various new agencies, began handling the same type of work formerly handled by contractors who would in normal times purchase

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[45] Commission's Counsel, Tr. 28,570-1, R. 8,448; Tr. 26,023-5, R. 7,661-2; Trial Examiner, Tr. 25,656, R. 7,563-4; Commission's Witness Runion, building material dealer, Tr. 12,048-52, R. 4,263-5; see also statement by Examiner rejecting further evidence, Tr. 32,187-90, R. 9,459-60.

[46] (Statement of the Examiner, Tr. 32,187-9, R. 9,459; Commission's Witness Runion, Tr. 12,047 and 12,050, R. 4,263-4.)

cement from dealers.[47] Dealers believed they were entitled to make such sales, and objected to cement producers selling directly to the temporary relief agencies.[48]

"Cement manufacturers have generally announced a policy of selling their product to, or for the account of, local building material dealers only. The principal exceptions to that policy have been sales to or for the use of the Federal, State and County Governments, steam railroads and large power projects, to whom cement has been sold on the same terms and at the same prices as to dealers." (Statement by Commission, Marq. Ex. 17, p. xii.)

Location of the Market for Cement.

The market for cement always is at the buyer's destination.[49]

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[47] (Commission's Witnesses: Haygbe, Tr. 2,277, R. 1,302-3; Runion, Tr. 12,053, R. 4,265-6; Tr. 12,057, R. 4,266; Hansen, Tr. 12,132, R. 4,291.)

[48] (Commission's Witnesses: Runion, Tr. 12,017-8, R. 4,245-5; Tr. 12,060-3, R. 4,267-8; Tr. 12,072, R. 4,270; Hansen, Tr. 12,102, R. 4,282-3; Tr. 12,133, R. 4,291.)

[49] This was the unvarying testimony of witnesses called by the Commission, including purchasing agents for various departments of the United States Government, of state governments and others. (Commission's Witnesses: Fry, U. S. Purchasing Agent, Tr. 181, R. 421; Tr. 201, R. 433; Tr. 202-3, R. 433-4; Tr. 212, R. 439; Tr. 230-1, R. 449-51; Taylor, Dept. of Interior, Tr. 1,307, R. 924-5; Tr. 1,316, R. 925-6; Rice, U. S. War Dept., Tr. 1,768-76, R. 1,104-6, Tr. 1,782, R. 1,110-1; Tr. 1,806, R. 1,122-3; Tr. 1,825, R.

Every buyer must know the cost of cement delivered at his destination.[50]

Buyers of cement in wholesale quantities purchase it solely on the basis of the total cost of the product at the buyer's destination.[51]

Contract awards are made solely on the basis of the total cost of the delivered cement at the destination.[52]

1,152-3; Ashley, U. S. Dept. of Agriculture, Tr. 5,457-9, R. 2,284-6; Admrl. Peoples, Chief of U. S. Procurement Division, Tr. 10,308-10, R. 3,751-2; Tr. 10,425-6, R. 3,783; Tr. 10,455-6, R. 3,791-2; Hamlin, State of Illinois Purchasing Dept., Tr. 11,834, R. 4,213-4; Blom, State of Iowa Highway Commission, Tr. 11,676-7, R. 4,176; Wecker, President of Marquette, Tr. 14,014, R. 4,865; Custer, U. S. Navy Dept., Tr. 21,306, R. 6,443.

[50] Counsel for Commission, Tr. 32,674, R. 9,577; Tr. 34,429, R. 10,155; Tr. 36,733-4, R. 11,117-9; Tr. 36,889, R. 11,166; Tr. 42,526, R. 13,067.

[51] Commission's Witnesses: Fry, Tr. 181, R. 421; Tr. 184, R. 423; Tr. 202, R. 433-4; Tr. 230-1, R. 450; Taylor, Tr. 1,255, R. 899-900; Tr. 1,307, R. 924; Tr. 1,316, R. 925-6; Tr. 1,321, R. 927; Rice, Tr. 1,734-5, R. 1,088; Tr. 1,768-71, R. 1,105-6; Tr. 1,806, R. 1,122-3; Tr. 1,825, R. 1,133; Ashley, Tr. 5,458-9, R. 2,285-6; Callaghan, Tr. 7,709, R. 2,953; Duffy, Tr. 7,937, R. 3,023-4; Harte, Tr. 8,247-8, R. 3-133-4; Simpson, Tr. 9,474, R. 3,579; Adm. Peoples, Tr. 10,052, R. 3,673-4; Tr. 10,308-10, R. 3,751-2; Hamlin, Tr. 11,834, R. 4,213-4; Blom, Tr. 11,677, R. 4,176; Trial Examiner, Tr. 28,049, R. 8,299; Tr. 42,277-8, R. 12,957-8; Counsel for Commission, Tr. 32,674, R. 9,577; Tr. 36,733-4, R. 11,117-9; Tr. 36,889, R. 11,166; Tr. 42,527, R. 13,067.

[52] Counsel for Commission, Tr. 36,299, R. 10,943; Trial Examiner, Tr. 28,049, R. 8,299; Tr. 32,134, R. 9,444-5; Tr. 42,277-8, R. 12,957-8.

"The Government, like any other purchaser that wants to use cement at a given place, will naturally figure the cost of it from various sources, at the place it wants to use it, in order to determine what is the most advantageous purchase—no dispute about it." (Commission's Counsel, Tr. 32,672-3, R. 9,577.)

"Awards are made on the basis of cost to the Government at point of use." (Statement of Trial Examiner in response to statement made by Mr. Wooden, Counsel for the Commission, Tr. 32,673, R. 9,577.)

"This admission applies to all periods of time. It is an all-inclusive proposition that any purchaser is going to find out what it is going to cost him laid down at his place." (Commission's Counsel, Mr. Wooden, Tr. 32,674, R. 9,577.)

There is a market price for delivered cement at every destination.[53] In recognition of this fact, government purchasing agencies have included in their contract provisions that "In no case shall the state pay more * * * at any delivery point than the local market price to dealers."[54]

[53] Commission's Witnesses: Hamlin, Illinois, Tr. 11,834, R. 4,213-4; Astell, Wisconsin Highway Commission, Tr. 12,182-3, R. 4,301; Blom, Iowa Highway Commission, Tr. 11,679-80, R. 4,177; Rice, U. S. War Dept., Tr. 1,736, R. 1,088-9.

[54] Commission's Exs. 1847C, 1852C, 1855, U. S., 1859J, 1881, 1885, 1889. Federal Government invitations are Respondent's Exs. 947D, 955D.

The Meaning of the Term Price.

The cost of transporting cement to the buyer's destination is a substantial element of cost which enters into the price made by the seller for its product delivered at the buyer's destination.[55]

The terms "price," "price quotations," "delivered costs," "destination costs," and "destination prices" as used throughout the record and in this brief, refer to and include transactions between cement producers, selling their product at wholesale, in carload lots, and their customers. As between such buyers and sellers, all of the foregoing terms are synonymous and all refer to the cost of **delivered cement** at buyer's destination.[56]

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[55] Complaint, Par THREE, R. 41; Commission's Witness Callaghan, building material dealer, Tr. 7,709, R. 2,953; Commission's Witness Simpson, Tr. 9,473, R. 3,579; Commission's Witness Blom, Iowa Highway Commission, Tr. 11,681, R. 4,177; Commission's Witness Taylor, U. S. Dept. Interior, Tr. 1,321-2, R. 927-8; Counsel for Commission, Tr. 36,732, R. 11,117. For this reason wholesale buyers usually purchase from the producers in carload quantities, freight costs per barrel being less on lots of such size. (Commission's Witness Simpson, Tr. 9,461-2, R. 3,577.)

[56] Commission's Witness: Fry, U. S. Dept. of Interior, Tr. 202-3, R. 433-4; Rice, U. S. War Dept., Tr. 3,532-3, R. 1,675-6; Harte, Tr. 8,247-8, R. 3,133-4; Blom, Iowa Highway Commission, Tr. 11,676-7, R. 4,176; Trial Examiner, Tr. 32,139-41, R. 9,446; Tr. 36,889, R. 11,166; Counsel for Commission, Tr. 36,732-5, R. 11,117-9.

In short, to every prospective buyer of cement "Price" means the cost to the buyer of "delivered cement"—at the buyer's point of delivery.

Development of Marketing Methods—Delivered Prices.

"The present methods of selling and distributing portland cement are the results of developments over a period of some 30 years, dating back to the time when most of the portland cement was produced in the Lehigh Valley district in Eastern Pennsylvania and New Jersey. The original simple method of soliciting business and quoting f.o.b. mill prices, the purchaser paying the freight, was not adequate to meet conditions created by the extension of the uses of portland cement and the expansion of producing areas which now dot the country from Maine to the Pacific Coast. Cement being a heavy low-priced commodity (by weight), the transportation charges, if shipped very far, constitute a large proportion of the total cost to the purchaser." (Marquette's Ex. 17, p. 26.)

Origin of Delivered Prices.

Delivered prices in the cement industry are more than 26 years old. (Commission's Counsel, October, 1938, Tr. 9,743, R. 3,629.)

"The origin of delivered prices in the cement industry as regards the exact time of its appearance and the reasons therefor is surrounded with some uncertainty. No record has been found showing that they

were in use prior to 1902. A letter from the Atlas Portland Cement Co., dated June 3, 1901, is the earliest documentary record pertaining to their origin that has come to the attention of the Commission."[57]

"In establishing this plant we desire it to be understood that sales will be made f.o.b. car's destination in all cases and this policy will also be adopted on our sales from our Pennsylvania mills as rapidly as arrangements can be consummated." (Marq. Ex. 16, pp. 29-30.)

Reasons for First Use of Delivered Prices.

"As mills came into production in the Middle West, sales competition for the market in their vicinity with the Lehigh Valley set in. So long as these mills merely met the prices of the Lehigh Valley, they, and not the Lehigh Valley, had the inconvenience and difficulty of quoting and selling at multiple f.o.b. mill prices. These multiple f.o.b. mill prices in that region (the Lehigh Valley) can be accounted for in the fact that mills in other territories were putting in base prices, *i. e.*, prices at their mills lower than the Lehigh Valley base price, together with freight therefrom to the respective mills. The cost of Eastern cement laid down in the West being high, because of freight charges,

[57] "We take pleasure in advising that our company has decided to establish a large plant in the West from which point we believe we can supply our product to many of our agents on a better basis than we have been able to do from our mills located in Pennsylvania. We have purchased land at Hannibal, Missouri, and will start at once the erection of a plant there.

made possible relatively high base prices for Western mills. Only as price competition among these mills, or the competition of substitutes, forced their base prices down would they fall much below the costs of Eastern cement delivered in the West." (Marq. Ex. 16, pp. 31-32.)

"As mills were built in new sections bringing production closer to many consumers, existing mills were forced to absorb a part of the freight or withdraw from the markets near the new mills. This led manufacturers to adopt the practice of adding the freight to the mill price and quoting an f.o.b. destination price." (Statement by Commission, Marq. Ex. 17, p. 26.)[58]

"Delivered prices, for each and every shipper in a given industry, directly variable with actual transportation charges, while theoretically possible, are uncommon for products that are competitively produced and sold. Such a price is on a parity with and, in final results, largely equivalent to a uniform f.o.b. shipping-point price without freight equalization; but with these

[58] A modern example of a similar development of new mills' basing their prices upon those of established mills and a natural change from f.o.b. mill pricing to delivered pricing, showing the general effect of competition between new mills and the old established mill, was related in the Commission's case. The Commission has referred to this as an extension of "the multiple basing point delivered price system * * * to western Washington." (Findings, Par. SEVEN, Sub-section (m)). See briefs on behalf of Respondents, Superior Portland Cement, Inc., and Northwestern Portland Cement Company, Case Nos. 28 and 29.

differences that in the f.o.b. destination sale title of commodity and risk of loss in transit rest in the seller, rather than in the buyer, and the buyer, if he pays the freight, pays it for the seller, deducting the same from his invoice before remitting. Such a price may have an advantage for the buyer over the f.o.b. shipping-point price in that it includes the freight and so enables him to more readily compare the final cost of the commodity laid down at his door by sellers freight-wise differently located." (Commission's statement, Marq. Ex. 16, pp. 6-7.)

"A sale made on a delivered price basis, or any price f.o.b. destination relieves the buyer of the payment of any separate charge for transportation of the commodity sold. Whatever the individual buyer pays for transportation is included in and is a part of the delivered price." (Commission's statement, Marq. Ex. 16, p. 7.)

F.O.B. Mill or Delivered Pricing.

"So far as the complaint is concerned there is no point made of whether they price f.o.b. mill or whether they price f.o.b. destination." (Statement by Counsel for Commission, Tr. 37,825, R. 11,459.)

"Whether the multiple f.o.b. mill price or the delivered price is used matters little, * * *. It is true that the buyer of cement is usually more interested in delivered prices than in f.o.b. mill prices, both because the former are a more direct means of comparing laid down costs of cement from different mills variously

located freightwise, and because his competitor is almost always one whose freight rates from mills are like his own * * *." (Marquette Ex. 16, p. 33.)

Mr. Wooden, Counsel for the Commission, conceded that,

"There is all the difference in the world between a policy of selling at a delivered price and the use of the basing point system of delivered prices." (Tr. 33,371, R. 9,812.)

Buyers Demand Delivered Prices.

The usual method of requesting prices is on a destination basis.[59]

Buyers generally ask for prices on delivered cement. Contractors demand delivered cement prices.[60]

[59] Statement by Counsel for Commission, Tr. 34,429, R. 10,155; See testimony of manager of cement plant owned by State of South Dakota, Commission's Witness Hartley, Tr. 12,772, R. 4,487.

[60] Statements by Trial Examiner, Tr. 27,566-7, R. 8,152-3; Tr. 32,139-40, R. 9,446; Tr. 36,889, R. 11,166; Tr. 42,277-8, R. 12,957-8; Commission's Witnesses: Duffy, Tr. 7,937, R. 3,023-4; Harte, Tr. 8,247-8, R. 3-133-4; Simpson, Tr. 9,474, R. 3,579; Vogel, Tr. 11,730-1, R. 4,184-5.

The reason for contractors preferring quotations for cement delivered to their destination is illustrated by the testimony of the Commission's Witness Vogel, a highway contractor, who, when asked if he had ever attempted to buy f.o.b. mill, replied, "No, that don't interest me. It is what it costs where I can use it that I am interested in." He added that if he did not have a delivered price, he would be required to maintain a traffic department of his own,

Building-material dealers require delivered cement prices.[61]

State purchasing agents desire delivered cement prices.[62]

The United States Government Procurement Agencies prefer to buy delivered cement at a delivered price.[63]

Complicated railroad tariffs influence buyers to ask for delivered prices. The tariffs are so complicated that most buyers cannot figure out freight costs.[64]

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which would add to his expense, as he had to know what the cost to lay the cement down at the point where he mixed concrete would be. (Tr. 11,730-1, R. 4,184-5.)

The Examiner ruled that the evidence in the record so established this fact that he refused further evidence on the point. (Tr. 30,531-2; R. 8,962-3; Tr. 32,139-40, R. 9,446; Tr. 38,856-7, R. 11,828.)

[61] Commission's Witness Duffy, Tr. 7,937, R. 3,023-4; Commission's Witness Dain, Tr. 8,032-33, R. 3,060. Counsel for the Commission admitted that, if numerous additional dealer witnesses were called, they would so testify. Tr. 36,734, R. 11,118; Tr. 36,797-8, R. 11,143-4; Tr. 36,889-90, R. 11,166-7.

[62] Commission's Witnesses: Blom, Tr. 11,676-7, R. Foley, Tr. 11,800-1, R. 4,204-5.

[63] Commission's Witnesses: Adm. Peoples, Head of U. S. Procurement Division, Tr. 10,458, R. 3,792; Fry, Dept. of Interior, Tr. 230, R. 449-50; Rice, U. S. War Dept., Tr. 1,824, R. 1,132.

[64] Commission's Witness Simpson, Interstate Commerce Commission rate expert, Tr. 9,469-70, R. 3,578; Tr. 9,509-12, R. 3,580-1; Tr. 19,325, R. 6,109. See also testimony of Commission's Witness Blom, Purchasing Agent for State of Iowa, Tr. 11,676-7, R. 4,176-7.

By buying delivered cement at delivered prices, the buyer saves the expense and trouble of maintaining experts to figure freight rates. (Commission's Witness Vogel, Tr. 11,731, R. 4,184-5.)

The sellers of cement are dependent upon the favor of their customers and must establish their sales policies so as to meet with the approval of those customers.[65]

All Cement Is Not Sold at Delivered Prices.

F.o.b. mill bids were formerly requested by the Government for delivery at destinations where "land grant" rates were available so that title would pass at the mill and shipment would be made on Government bills of lading. Land grant rates were discontinued in December, 1945. (59 Stat. 606; 49 U.S.C.A.; Sec. 65.)

An f.o.b. mill price may be in any one of several forms:

(a) A destination-cost-bid, from which is to be deducted a specific allowance named by the bidder.[66]

(b) A destination-cost-bid, from which is to be de-

[65] The Examiner found that it had been shown in at least 100 instances, both by oral and documentary proof, that customers approved of cement producers' sales policy. (Tr. 35,999, designated but not printed. See also Statement by Examiner, Tr. 36,890, R. 11,167.)

[66] (*e. g.*, Commission's Ex. 182-F-G; Commission's Witness Rice, Tr. 1,611, R. 1,041; Tr. 3,508, R. 1,663-4; Tr. 3,512-3, R. 1,665-6; Tr. 3,521, R. 1,670; Tr. 3,523, R. 1,671; Tr. 3,528, R. 1,674; Commission's Exhibits 770, 778, 765 A-F, 187 A; see also Resp. Ex. 1,057-A-C.)

ducted the amount of commercial freight, the amount of freight at a land grant rate, or at a special rate. (Sometimes called a "Control Clause" bid.)[87]

(c) Quotation of price f.o.b. cars (Commission's Exhibits 192, 783, 790) or f.o.b. barge at the plant. (Commission's Ex. 793.)

Every year for ten years prior to the filing of the complaint in these proceedings, Marquette has, as requested by the U. S. Government, submitted f.o.b. mill bids.

Marquette's action in selling cement to the U. S. Government f.o.b. mill was not unique. The same exhibits that show the large amounts of cement priced f.o.b. mill by Marquette to the Government, during the ten years next preceding the complaint, show **f.o.b. mill bids by many other bidders.** As Marquette's marketing area covered only a very small part of the United States, the several million barrels so involved would be multiplied many times in summing up the total of such sales for the entire country. A few of such bids will indicate the volume of such sales. On 35 United States Government lettings, Marquette submitted f.o.b. mill bids on a total of 10,066,150 barrels and received awards in each of these ten years as the lowest bidder (that is, giving the Government the

[87] (Commission's Witness Rice, Tr. 1,745-6, R. 1,092-3; Commission's Exhibit 157; see also Resp. Ex. 2,995-A-S.)

lowest destination cost) for a total of 1,668,200 barrels.[68]

The Control Clause.

The control clause permitted the Government to deduct the lowest land grant or special rate in order to get a figure at the mill. This was considered as the equivalent of bidding an f.o.b. mill quotation. (Commission's Witness Rice, Tr. 1,745-6, R. 1,092-3.)

The U. S. Government has itself used a similar control clause, and has requested bids on the basis of its use.[69]

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[68] Examples of F.O.B. Mill Bids of Marquette and Other Companies, Shown in U. S. Government Abstracts Commission's Exhibits.

765 A-F	767 A-B	171 A-C
771	772	769
775	185A	774
779	781	777 A-B
785	787	783
791	793	789
796	398 A-E	192
193	401	188E
766 A-D	182A	770
183 B	773	184H
776	186E	778
780	782	784
786	788	790
792 A, B	794	795
397	187A	165
166		

Commission's Witness Rice, Tr. 3,505-43, R. 1,663-79.

[69] (Commission's Ex. 793, 401, 794; Respondents' Ex. 2995 A-S, 2918 A, Z-20; Commission's Ex. 795; Respon-

If a bidder uses the land grant rate in figuring its bid submitted with a control clause, the Government is not deprived of the benefit of any cheaper freight rate available to it.[70]

Bids using the control clause, submitted to the Government, have been lower than the commercial price at the same destination.[71]

Unless a land grant rate affords a substantial saving to the United States Government there is no advantage in an f.o.b. plant quotation and the Government prefers to buy delivered cement, priced at destination.[72]

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dents' Ex. 1082 A-S; Commission's Ex. 124 B, 170 B; Commission's Witness Taylor, Tr. 1,263, R. 904; Tr. 1,273, R. 909-10; Tr. 1,296-7, R. 920-1.)

[70] (Commission's Witness Taylor, Tr. 1,240, R. 890-1; Commission's Witness Holmes, Tr. 21,089, R. 6,435; Commission's Witness Rice, Tr. 1,731, R. 1,085-6.)

[71] (Commission's Witness Rice, Tr. 1,819, H. 1,129; Commission's Ex. 789; Commission's Ex. 157, 401.)

[72] Commission's Witness Fry, Tr. 214, R. 440-1; Tr. 230, R. 449-50; Commission's Witness Peoples, Tr. 10,458, R. 3,792; Commission's Witness Rice, Tr. 1,803-4, R. 1,121-2; Tr. 1,824, R. 1,132.

As an illustrative example, the Government asked for prices f.o.b. plant and also f.o.b. destination. When the bids were abstracted, it appeared that the sum of the f.o.b. plant price bid plus the land grant rate to the destination exactly equaled a delivered or destination price bid based on commercial freight rate. The award was made on the basis of the delivered price bid; the Commission's Exhibit showing that the Government preferred to accept the des-

Freight Rates—Nature of.

Cement belongs to the class of heavy goods, the carriage charges of which constitute a substantial part of the cost to the customer. (Compl., Par. Three, R. 41.)

Figuring of freight rates is a matter for a traffic expert. (Commission's Witness Simpson, a freight rate expert for the Interstate Commerce Commission, Tr. 9,509-10, R. 3,580.) There are millions of freight rates, rules and regulations published in tariffs issued by railroad traffic associations. (Commission's Witness Simpson, Tr. 19,325, R. 6,109.)

The services of claim adjusters to recheck freight bills is essential to the economical operation of all business that must pay freight charges. (Commission's Witness Simpson, Tr. 9,512, R. 3,580-81.) For example, the United States Government employs a force of more than 200 auditors in the General Accounting Office, 100 in the War Department, and a number in other departments engaged in doing this kind of work. (Commission's Witness Simpson, Tr. 9,511, R. 3,580.)

Nobody can check a freight rate quickly and easily. It would be impossible for any dealer who had not made a special study of freight tariffs to check freight rates himself. He would have to know a good deal

tination price or delivered price rather than the f.o.b. plant price, in order to save expense and trouble involved in shipping on a Government bill of lading. (Commission's Ex. 171-A through C, Commission's Witness Peoples, Tr. 10,456-8, R. 3,791-2.)

about a very complicated set of tariffs. (Commission's Witness Simpson, Tr. 9,469, R. 3,578; Commission's Witness Blom, Tr. 11,676-7, R. 4,176-7.) By buying "delivered cement" the buyer saves the expense and bother of figuring freight rates. (Commission's Witness Simpson, Tr. 9,530, R. 3,583; Vogel, Tr. 11,731, R. 4,185.)

Freight Rate Books.

Bidders must know the cost of transportation in order to make their bids attractive. (Commission's Witness Taylor, Tr. 1,321, R. 927-8.)

The practice of distributing freight rate information did not originate with The Cement Institute. Until the Cement Manufacturers' Protective Association was discontinued in 1922, it furnished freight rate information, in much the same form as the freight rate books put out by the Institute after 1929. (The Commission's Findings of Fact, Par. 8, Section B, R. 16,007.)

Sources of Information Regarding Land Grant Rates.

Information regarding land grant freight rates has been obtainable from various sources:

(a) From railroads.[73]

(b) From Government invitations to bid. (Commission's Exhibit 167-A-G.)

[73] Commission's Witnesses: Fry, Tr. 226-7, R. 447-8; Taylor, Tr. 1,249-50, R. 895-7; Neylan, Tr. 6,646, R. 2,663-4; Tr. 21,143, R. 6,438.

(c) From Government abstracts of bids.[74]

(d) From computations by producer's traffic experts. (Commission's Witness Taylor, Tr. 1,241, R. 891; Tr. 1,250, R. 896-7; Tr. 1,291, R. 918.)

Identical Prices.

Frequently, buyers located in an area where they are competing one against another are at different distances, transportation-cost-wise, from the mill from which they all may be buying cement at a given time. It is the usual custom to equalize the price of the delivered product to buyers, located in an area where they are competing one against another, thus avoiding discrimination. (Commission's Witnesses.)[75]

So soon as any change in wholesale market quotations becomes known to a dealer, the dealer will inform the cement producer from whom it usually buys. If such a change is a reduction in price, it is promptly met by other cement producers competing for business in such market area. If the price change is an increase, there may be a lag of time during which other cement producers may or may not follow it, and if it is not followed within a reasonable time the plant that has led in quoting the increase must reduce its

[74] Commission's Exhibits: 165, 182, 187, 765, 766, 767, 769, 770, 771, 772, 773, 777, 778, 779, 780, 781, 782, 783, 787, 788, 789, 790, 791, 792, 793; Commission's Witness Rice, Tr. 1,750, R. 1,094-5.

[75] Twamley, Tr. 6,733-4, R. 2,684, Tr. 7,085, R. 2,770-71; Cronkrite, Tr. 13,522-5, R. 4,701-03.

quotations. (Commission's Witness Neylan, Tr. 6,109, R. 2,515-6.)

Friendly dealers offer the mills from whom they buy a chance to meet lower price quotations. (Statement by Commission's Counsel, Tr. 39,231-2, R. 11,940-1.)

The producers are always on the alert and make inquiries through their salesmen as to price changes. (Statement by Examiner, Tr. 39,610, R. 12,065.)

Price Leads and Lags.

During the period when price changes are attempted by any producer, there will be variations in quotations amongst competitors.[76]

After a period of time there is an adjustment and the price tends to become uniform at any given destination, (the market place) as a result of withdrawal or modification of a lead. Thus, again, all buyers in the same area of competition find themselves on a basis of equality with an established market price. (See Resp. Ex. 85, Commission's Witness Neylan, Tr. 6,109, R. 2,515-6; Commission's Witness Wecker, Tr. 14,019-20, R. 4,867-8.)

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[76] This is shown by comparison of Commission's Exhibits 2,268-9-70 with 2,286; 2,273 with 2,306; 2,275 with 2,303; 2,276 with 2,298; See also Commission's Exhibits 1,121-J-K-M; Resp. Ex. 85; Commission's Witnesses: Neylan, Tr. 6,263-4, R. 2,563-4; Wing, Tr. 8,159-60, R. 3,102-3; Capen, Tr. 12,703, R. 4,457-8; Tr. 12,716, R. 4,464; Royal, Tr. 19,540, R. 6,186.

Leads and lags and final leveling out of prices at any market place is not a phenomenon peculiar to cement but it occurs with other building materials. (Commission's Witness Wray, Material dealer, Tr. 7,856, R. 3,003-4; Commission's Witness Adm. Peoples, Tr. 10,324, R. 3,757-8.) It also occurs in the case of resale prices made by dealers, over which manufacturers have no control. (Commission's Witness Runion, Tr. 12,068, R. 4,268-9; Commission's Witness Duffy, Tr. 7,930-7, R. 3,023.)

In addition to the common variations which occur at the time of price changes, there are frequent price cuts to contractors and dealers.[77]

There are many instances that illustrate attempted price leads which have not been followed by competitors with the consequence that the would-be price leader has been compelled to abandon its lead increase in order to meet the lag of competition which it found in the field.[78]

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[77] Commission's Witnesses: Neylan, Tr. 6,242, R. 2,557; Dankel, Tr. 11,336, R. 4,040-1; Tr. 11,342, R. 4,043; Tr. 11,353-4, R. 4,047-8; Affleck, Tr. 13,045, R. 4,558; Hill, Tr. 13,296-7, R. 4,648; Royal, Tr. 19,622-4, R. 6,191.

[78] Commission's Witnesses: Neylan, Tr. 6,263-4, R. 2,563-4; Wing, Tr. 8,159-60, R. 3,102-3; Royal, Tr. 19,540, R. 6,186.

Identical Bid Prices and Governmental Purchasing Agencies.

The United States Government invited bidders to equalize freight rates.[79]

Both State and Federal Governments frequently have provided in their invitation for bids that they shall not be required to pay more for cement than the local market price paid by dealers. The bid forms contain "price decline" clauses.[80]

State Purchasing Agencies encouraged identical bidding and discouraged any attempts to get business through submitting a bid lower than the prevailing market price at specified destinations. It was not

[79] Commission's Witnesses: Rice, Tr. 1,822-3, R. 1,130-2; Hayghe, U. S. Procurement Division, Treasury Department, testified:

> "I think any bidder should have the opportunity to equalize all differentials that might be involved—freight rates or otherwise." (Tr. 2,453, R. 1,360-1);

Commission's Ex. 171-G, 180-I.

[80] Examples of such Federal invitations will be found in Respondents' Ex. 947-D and 955-D. Examples of such State invitations will be found in many places in the record, for example, Iowa, Commission's Ex. 1,847-C, 1,852-C, 1855-UU, and Commission's Witness Blom, Tr. 11,679-80, R. 4,177; Indiana, Commission's Ex. 1,859-J; Illinois Commission's Ex. 1,881, 1,885, 1,889; Wisconsin, Commission's Witness Astell, Tr. 12,178, and Tr. 12,182, R. 4,301; Louisiana, Commission's Witness Henderlite, Tr. 13,815-6, R. 4,798-9; see also Commission's Ex. 2,457, 2,460.

unusual for State Purchasing Agents, when bids were not identical, to refuse to award the contract to the low bidder, and to reject all bids and issue new invitations. Nor was it unusual for a State Agency, when some producer, hungry for business, would slash the current wholesale prices at a large number of destinations where the State specifications required prices for delivered cement, to refuse to make awards to the lowest bidder but instead allow the higher bidders to lower their prices to meet the delivered prices of the lowest bidder. Sometimes the low bidder would receive much the smaller share of the awards.[81]

[81] Examples of Allowing Bidders to Lower Their Bids to Meet Prices by Lowest Bidder:

Indiana, December 17, 1931, 2 million barrels. (Commission's Exhibit 1,864.) The bids were not identical, but all bids were rejected. (Commission's Witness Foley, Tr. 11,778-80, R. 4,198-9.) Commission's Exhibit 1,863 covers the second letting for the year 1932—2 million barrels (Commission's witness Foley, Tr. 11,779-80, R. 4,199). The bids were not identical but the award was not made to the lowest bidder. One cement producer was not low at any destination and yet received an award on the letting in excess of any award to any other bidder. (Commission's witness Foley, Tr. 11,799, R. 4,204; Tr. 11,809, R. 4,209). After the bids were received, the Indiana Purchasing Agent permitted unsuccessful bidders to revise their quotations and to lower them to make them identical with the lowest prices received. Then the State made the largest awards to those who had first bid high, and had later been permitted to make their prices identical with the prices offered by the lowest bidder. The low bidder on a majority of the destinations listed for the 2 mil-

The practice of submitting bids, on successive lettings, at a lower price than the lowest price on the previous letting will eventually result in selling at a loss. (Commission's Witness Adm. Peoples, U. S. Procurement Division, Tr. 10,473, R. 3,794.)

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lion barrels required, received the smallest end of the award (Commission's witness Foley, Tr. 11,799-812, R. 4,204-10). The State of Indiana had similarly treated the low bidder the previous year. (See Commission's Exhibit 1,875 A-B, and Commission's Witness Foley, Tr. 11,781-2, R. 4,199-4,200; Tr. 11,785-6, R. 4,201.)

Wisconsin in 1931 permitted five bidders to revise their bids downward to meet the competition of a low bidder (Commission's Witness Astell, Tr. 12,161-7, R. 4,298-4,300).

Louisiana, 1929—Lone Star bid was uniformly low for each destination, but the award was not made to Lone Star on these low bids. The business was divided up with five other companies with identical prices at each destination (Commission's Exhibit 2,451; Commission's Witness Henderlite, Tr. 13,805-6, R. 4,795-6).

Missouri bids for 1931 (Commission's Exhibit 2,439). The bids were not identical but an award was not made to a low bidder. The bids were rejected and retaken (Commission's Exhibit 2,440). Then the high bidders on this letting were allowed to reduce their prices to make them identical with low bids. On the next Missouri State letting of October, 1931, (Commission's Ex. 2,441) Missouri Portland bid substantially less than the current low price and was low bidder at all destinations with the possible exception of three or four, but the low bidder's competitors were again allowed to meet the low prices. (Respondents' Witness Alexander, Tr. 37372, R. 11299; Tr. 37291-4, R. 11276-8.)

The identity or non-identity of bids has no relation to, or connection with, the Government's obtaining lower prices than other buyers of cement. (Commission's Witness Adm. Peoples, Tr. 10,471, R 3,794.)

The United States Government received non-identical bids before, during, and after the N. R. A. code period from the cement producers (Commission's Witness Taylor, Tr. 1,244-5, R. 892-4.)

It made no real difference to a State purchasing agency whether or not bids were identical as by the conditions of the letting the State was always sure of getting the lowest market price current at each destination. (Commission's Witness Blom, Tr. 11,679-80, R. 4,177.)

Commission's witness, Adm. Peoples, in charge of U. S. Procurement Division, knew of no instances of the Government paying more than the prevailing market price. (Tr. 10,366, R. 3,769-70; see also Commission's Witness Rice, Tr. 1,736, R. 1,088-9.)

Where Governmental agencies have entered into private negotiations with cement producers, the contracts have been closed at prices lower than wholesale market prices.[82]

[82] Commission's Exhibit 329-A-Z; Commission's Witnesses: Rice, Tr. 1,703, R. 1072; Tr. 1,742-3, R. 1,090-2; Holmes, Tr. 2,340, R. 1,322-3; Tr. 2,346, R. 1,326; Neylan, Tr. 6,407-8, R. 2,597-8.

Other Practices of Cement Producers.

Respondents endeavor to sell as much cement as possible (Counsel for Commission, Wooden, Tr. 35776, R. 10759). In this endeavor Respondents attempt to sell to the same customers at the same time (Counsel for Commission, MacIntyre, Tr. 32081, R. 9431). In an effort to sell as much cement as possible Respondents offer varying kinds of service and technical advice and use various other types of sales efforts (Counsel for Commission, Wooden, Tr. 32082, R. 9432, Examiner Norwood, Tr. 36890, R. 11166-67).

Organization, Purposes and Powers of the Cement Institute and Its Activities.

The Cement Institute was organized in August of 1929 with about nineteen Eastern cement producers as members. The articles of association contain its powers and purposes. (Resp. Ex. 2989, Commission's Witness Reiter, Tr. 16,711-12, R. 5,300-01.) They provide that its powers may be exercised by a board of trustees in meetings duly assembled. There is no provision for delegation of any powers granted to the trustees, to any individual, officer, trustee, committee, bureau, or other agent.

From May, 1931 until June, 1933, there were only 21 active members of the Institute. (Commission's Witness Reiter, Tr. 16,717, R. 5,304.) The only activity of the Institute then was the freight rate service. (Commission's Witness Reiter, Tr. 16,714-5,

R. 5,302-3; Commission's Witness MacFarland, Tr. 11,465-6, R. 4,100.) (Commission's Ex. 136-3K-3L.) In May, 1933, the National Industrial Recovery Bill was under consideration. A trustee of the Institute circularized the industry, suggesting that they send to him qualified applications for membership in the Cement Institute to be withheld by him **until new Articles of association could be drafted.** (Respondents' Ex. 2930-A.)

Numerous cement companies joined the Cement Institute in anticipation of the program that was initiated under N. R. A. (Statement by Mr. Wooden, Counsel for the Commission, Tr. 33,912, R. 10,028.)

The N. R. A. Code for the Cement Industry was approved in November, 1933. (Commission's Exhibit 557.)

In May, 1935, the Supreme Court declared the N. R. A. codes unlawful. After the Shechter decision, Government officials urged adherence to the N. R. A. principles including continuation of codes as voluntary arrangements in industry (statement of Mr. Wooden, Counsel for the Commission, Tr. 4,174, R. 1,896-7). A committee consisting of former members of the Code Authority of the Industry was appointed "to carry on as far as they legally can the functions theretofore exercised by the Code Authority" pending new legislation. (Commission's Ex. 623-A-C.) Producers almost immediately began to resign from the Institute. (Commission's Witness Reiter, Tr. 2,810, R. 1,440; Commission's Witness Hill, Tr. 13,220-1, R. 4,624.)

By December, 1935, the possibility of renewed activity in the field of government controlled fair trade practice agreements had so faded out that on December 9, 1935, the Institute trustees formally dissolved the Trade Practice Committee and limited further activities of the Institute and price filing was discontinued. (Commission's Ex. 624-B-G.) By May, 1936, suggestions were made for complete abandonment of the Institute. (Commission's Exhibit 625-D.)

FACTS WHICH RELATE PRIMARILY TO MARQUETTE, SECONDARILY TO ALL PRODUCERS.

Unlike the previous Statements of Fact, the following statements relate primarily to Marquette and cover its affirmative defense, including specific denials of combination and agreement by its principal executives, the President and Vice-President, who were in position to know the intimate details of its business practices. Therefore, some of the supporting references will be to the record of the testimony of defendants' witnesses, some to defendants' exhibits—in addition to some references to the record of the Commission's witnesses and exhibits.

Description of Marquette Organization.

Marquette is an Illinois corporation organized in 1898. It has two manufacturing plants, one at Oglesby, Illinois, which is so close to La Salle, Illinois, that it is commonly referred to as the La Salle Plant, and one at Marquette, Missouri, so close to Cape Girardeau,

Missouri, that it is commonly referred to as the Cape Girardeau Plant. (Commission's Witness Wecker, Pres. of Marquette, Tr: 14,039, R. 4,877-8.)

Marquette's Marketing Area.

Marquette generally offers for sale delivered cement in part of the Mississippi Valley. It does not offer to sell its product in any seaboard area in competition with cement imported from foreign countries.[83]

Deliveries.

Generally, Marquette has transported cement to the buyer's destination by railroad delivery, but it also owns and operates barge equipment in which it delivers bulk cement from its plant at Cape Girardeau, Missouri. (Commission's witness Wecker, Tr. 13,963, R. 4,846-7.) Marquette has made deliveries from its Oglesby plant by a combination of water and rail. (Commission's witness Wecker, Tr. 13,963, R. 4,846-7.)

Occasionally, the United States Government has requested prices f.o.b. barge for water delivery, where a Government project made it desirable and where the quantities of cement required were so large as to make barge shipment practicable. (Def. witness Colburn, Tr. 39,034-5, R. 11,877-8.)

Marquette did work out and offer to the United States Government a money saving method of trans-

[83] Def. Witness Colburn, Vice President of Marquette, Tr. 39,037, R. 11,878-9; Commission's witness Neylan, Tr. 6,534 to 6,543 inclusive, R. 2,628-30.

porting cement by barge as early as June, 1928.[84] (Com. Ex. 184-H.)

Marquette has repeatedly quoted to the United States Government on combination of railroad and barge line.[85]

Whenever the United States Government was able to make a saving by water transportation and so requested of Marquette, the request was complied with, Marquette bidding f.o.b. Government barges at its plant at Cape Girardeau. This was the practice during the ten years next preceding the Complaint.[86]

Marquette made it a rule, and it was its policy, to sell to the Government at all times as it was requested to do. (Defendants' witness Colburn, Vice-President of Marquette, Tr. 39,035-6, R. 11,877-8.)

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[84] In this instance Marquette bid, not only f.o.b. rail cars as requested by the Government, but, on its own initiative, submitted a bid from the American Barge Line for transporting cement from Marquette's plant to the Government destination at Greenville, Mississippi. The Government agency branded the bid as irregular. The purchasing agent did not know what to do with the water delivery bid. (Com. Ex. 184-H.) Thereafter, Government purchasing agents began asking for bids based on barge delivery, when it appeared that such delivery was available. (Com. Ex. 769.) Marquette complied with the request.

[85] Commission's Witness Wecker, Tr. 13,965-6, R. 4-847-8; Commission's Ex. 769, 771, 772, 777 A-B, 780, 791, 793; 795.

[86] The statement is based upon U. S. Government abstracts of bids from the year 1927 through 1936. (Commission's Ex. 182, 184-H, 397, 398-A through E, 769, 771, 772, 777 A-B 780, 783, 785, 786, 788, 790, 791, 793, 794, 795, 796.)

Deliveries of Cement to Trucks.

There have been very, very little deliveries of cement by truck from Marquette's mills. There was no time when there was more trucking than at another time. Marquette has always been opposed to the idea of having trucks running around its yards. (Commission's Witness Wecker, Pres. of Marquette, Tr. 13,966-7, R. 8,848-9; Commission's Exhibits 1,043-O, 1,731, which should be dated 1932 instead of 1931—Defendants' Witness Cole, Tr. 40,924-5, R. 12,476-7; Commission's Exhibits 1496 A-C, 933-2 S, 933-3 C, 933-3D.) The statement in Petitioner's Brief, p. 102, that Marquette was a party to an agreement limiting trucking, is not supported by the citations.

Marquette's Method of Making and Quoting Prices.

In making its prices Marquette has determined them from the standpoint of demand for its product in various marketing areas with due regard to the amount it believed its customers would be willing to pay, when its sales efforts were aided by the persuasive ability of its salesmen, and also with regard to the amount it would have to receive in order to pay for the operation of its business, and if possible end its year not with a loss, but with a profit. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,046, R. 11,884-5.)

Marquette makes its prices by determining mill nets that it desires and adding to such figures the freight from its plants to the various destinations (the market

places). Marquette has found that to do any business, it must have prices at least as low as its competition. (Commission's Witness Wecker, Tr. 14,083, R. 4,891.) Whenever it tries to sell in a market where any competitor has quoted a price less than that which Marquette has computed, Marquette has to meet that lower price and does so, or foregoes the business. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,962-3, R. 12,179-80.) Whenever it has chosen to make prices lower than those of its competitor, it has been free to do so, and has done so. (Commission's Witness Wecker, Tr. 14,083, R. 4,891-2.) When Marquette has met the lower prices of its competitors, Marquette's price and that of its competitors were identical at the same time and place. Around its own plants, where Marquette has had a delivery cost advantage over its competitors, competitors have had to meet Marquette's lower prices or forego the business. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,052-3, R. 11,888; Tr. 39,970, R. 12,183.)

Marquette has not agreed or combined with, nor cooperated or collaborated with any other manufacturer or dealer to employ any particular method or practice of marketing or selling cement.[87]

Marquette has had no price at its plant, except insofar as it has quoted f.o.b. plant prices to the United States Government when requested to do so. (Com-

[87] Commission's Witness Wecker, Pres. of Marquette, Tr. 14,003, R. 4,859; Tr. 14,007, R. 4,861-2; Defendants Witness Colburn, Vice Pres. of Marquette, Tr. 39,051-2, R. 11,887-8).

mission's Witness Wecker, Pres. of Marquette, Tr. 14,011, R. 4,864; Defendants' Witness Colburn, Tr. 39,034-5, R. 11,877-8.)

Generally Marquette has not received any request to sell its product otherwise than as delivered cement. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,034, R. 11,877.)

Marquette's prices are independently made. (Commission's Witness Wecker, Pres. of Marquette, Tr. 14,004. R. 4,859-60; Colburn, Vice Pres. of Marquette, Tr. 39,052, R. 11,888.) Marquette has at all times been free to raise or lower its prices or to quote such prices as it saw fit, and it has done so without any agreement, combination or understanding with any other producer. (Colburn, Vice Pres. of Marquette, Tr. 39,051-2, R. 11,877.)

Marquette has intentionally underbid competitors in order to get business (Commission's Witness Wecker, Pres. of Marquette, Tr. 14,005-6, R. 4,860-1) and at times its prices have been lower than those of competitors. (Commission's Witness Wecker, Tr. 14,007-8, R. 4,861-2.) This practice has never ceased at any time save as it was limited somewhat during the N. R. A. Code period. (Commission's Witness Wecker, Tr. 14,076-7, R. 4,888-9.)

No Involuntary or "Punitive Base" at Marquette Mill.
(See Petitioner's Brief, page 73.)

Marquette went through experiences of price cutting and very aggressive competition.[88] The Commission's exhibits and testimony tell the whole truth, which the Commission endeavors to suppress and distort concerning the price war of 1931-32. It really began back in 1930, as shown by Commission's Exhibit 971-31-A, an interoffice record of the Alpha Company, dated December 1, 1930, which discloses that that Company had given instructions both to its St. Louis and Birmingham Plants to send out quotations "meeting as nearly as they could the competition established by the Marquette Company." The Commission's own case contains further evidence supporting the true conclusion that what Marquette's competitors were attempting to do was to keep pace with Marquette's lower prices. (Tr. 14,013-4, R. 4,864-5; Tr. 14,076, R. 4,888; Tr. 23,285-7, R. 6,894-5; Tr. 24,587-8-9, R. 7,314-5.)

In the period of low prices during 1930 to 1932, the impact of Marquette's low prices was felt even as far

[88] Commission's Witnesses: Royal, Tr. 12,393, R. 4,368-9; Horner, Tr. 12,413, R. 4,378; Capen, Tr. 12,703, R. 4,457-8; Affleck, Tr. 13,047-8, R. 4,559; Tyler, Tr. 14,343, R. 4,982; Royal, Tr. 19,640, R. 6,193.

Defendants Witnesses: Coogan, Tr. 24,587-8, R. 7,314-5; Fellows, Tr. 25,869, R. 7,633; Koch, Tr. 32,754-5, R. 9,599-9600; Tr. 32,763; R. 9,602; Tr. 33,236-8, R. 9,751-3; MacDonald, Tr. 36,477, R. 11,017-8; Tr. 36,612, R. 11,070-1; Tr. 36,695-9, R. 11,104-6).

away as South Dakota, where the South Dakota mill was thereby forced to meet Marquette's lower prices. (Tr. 12,751-2, R. 4,478; Tr. 12,769, R. 4,486.) In fact, during that period, Marquette's prices lowered prices as far afield as Nebraska, Kansas, Oklahoma, Kentucky and Indiana. (Com. Exs. 1121F-G.)

The punishment that Marquette received for its price cutting in 1931 and 1932 was not administered by its competitors. Really, it was administered by Marquette itself in 1932. As the record undisputedly shows, Marquette, that year, sold all the cement that it could make and lost more than a million dollars. (Respondents' Witness Colburn, Tr. 39049, R. 11886; Tr. 40004, R. 12202.)

Subsequent to such experiences, Marquette, in bidding or quoting prices for delivered cement to governmental agencies generally used the current wholesale price at the destination to which cement was to be delivered, with certain exceptions. Marquette continued to give the United States government the advantage of land grant rates. (Commission's Ex. 766A-D, 767, 182, 183, 769, 772, 770, 771, 774, 773, 185A, 776, 775, 777A-B, 778A-B, 779, 398A-E, 184H, 780, 781, 782, 783, 784, 785, 786, 787, 788, 187A, 188E, 789, 790, 791, 397, 792-A-B, 794, 192, 793, 795, 796; Commission's Witness Rice, Tr. 3,508-43, R. 1,663-79; Respondents' Ex. 45; Commission's Witness Adm. Peoples, Tr. 10,441-2, R. 3,789-90.) Marquette also continued to give the United States Government advantage of barge shipments and combination of water and rail. (Commission's Ex. 796, 795,

794, 793, 791, 790, 788, 786, 785, 783, 777A-B, 772, 771, 769, 397, 398A-E, 182, 184H, 780; Commission's Witness Wecker, Tr. 13,965-6, R. 4,847-8.) Marquette continued to quote and sell at lower than the current wholesale market price for delivered cement where it was afforded the opportunity to bargain independently with the buyers. An example of this is Marquette's deal with the State of Illinois in 1933, a sale which involved 2,000,000 barrels of cement. (Commission's Witness Wecker, Tr. 14,050-5, R. 4,881-2; Commission's Ex. 1898; Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,951, R. 12,175; Tr 40,013, R. 12,207-8.) Marquette also extended a contract under which it was selling at less than the going wholesale market price to the State of Wisconsin. (Commission's Witness Astell, Tr. 12,149, R. 4,294-5.)

Marquette's method of quoting delivered prices was to broadcast them in letters addressed to dealers, in which prices at the dealers' destinations were quoted. (Commission's Ex. 2,268, 2,269, 2,270, 2,273; Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,049, R. 11,886; Respondents' Ex. 85.)

Marquette's Efforts at Price Leadership.

An illustrative example of an unsuccessful price lead and a resulting lag with a final adjustment made by Marquette will be found in the occurrence in 1932. Marquette had quoted to the State of Illinois prices considerably lower than its then current market prices at various destinations and had thus sold 2,500,000 bar-

rels of cement. By July, 1932, it had sold all the cement it could make for that year. Its loss for 1932 was more than $1,000,000.00. Cement prices and consumption of cement had declined very substantially during the years 1930, 1931, and 1932. The low point in the market was reached and a general upswing in price began in the spring of 1932. Marquette decided that it must get more money for its product in 1933. Accordingly, in July, 1932, Marquette sent out letters to its dealers broadcasting a price increase lead.[89]

Competitors did not follow this lead in all markets and as a result, Marquette was compelled to withdraw and reduce its price lead.[90]

Marquette had no more money to lose in 1933. (Defendant's Witness Colburn, Tr. 40,004, R. 12,202-3.) It adhered to its going price in the bid[91] to the State of Illinois for that year. (Defendant's Witness Colburn, Tr. 39,969, R. 12,182-3.) With respect to the level

[89] Defendant's Witness Colburn, Tr. 39,049, R. 11,886; Tr. 39,966-68, R. 12,181-2; Tr. 39,997, R. 12,199; Tr. 40,004, R. 12,202-3; Commission's Exhibits 2268, 2269, 2270, 2271, 2272, 2273.

[90] Resp. Ex. 85; Commission's Witness Wecker, Tr. 14,019-20, R. 4,867-8; Compare Commission's Exhibits 2,268-9-70 with 2,286, 2,273 with 2,306, 2,275 with 2,303, 2,276 with 2,298.

[91] This is the only purported instance of a state requesting an f.o.b. mill bid. Actually, with the bidder required to prepay freight, the State bought at delivered prices and protected itself so as not to pay more than the "commercial market" at each destination. (Com. Ex. 1893, pp. 2 and 12.)

of these 1933 prices, stated Robert Kingery, acting Director of Public Works and Buildings for State of Illinois:

> "Comparing the 1933 prices against the average for the years 1926 to 1930, inclusive, shows a reduction in price of 20 per cent.[92] * * * It was hardly expected that the prices for 1932 or even for 1931 could prevail in 1933 because it is a very significant fact that prices for these two years were the result of a competitive price cutting campaign due to an inactive market which could hardly be expected to continue without serious loss to the cement company." (Resp. Ex. 61A through C.)

However, when it was offered an order for two million barrels by the State, it negotiated a sale in June, 1933, but at a price lower than any of the producing companies bid on the State invitation.[93]

Again Marquette had sold as much as it could possibly produce and deliver in that entire year with its plant running to full capacity. (Defendant's Witness Colburn, Vice-Pres. of Marquette, Tr. 39,998, R. 12,199-200.) Wherefore Marquette again sent out announcements to its dealer trade, increasing its prices at vari-

[92] The Petitioner's Brief states: "With minor exceptions, the base prices of the respondent producers in 1938 were those, or substantially those, which they had established in the 1932-33 period." (p. 46.)

[93] Commission's Witness Wecker, Tr. 14,050-5, R. 4,881-2; Defendant's Witnesses: Fellows, Tr. 25,866-7, R. 7,632-3; Colburn, Tr. 39,951, R. 12,175; Tr. 39,988-9, R. 12,193-4; Tr. 40,013, R. 12,207-8; Commission's Exhibit 1,898.

ous destinations. (Defendant's Witness Colburn, Tr. 39,049, R. 11,886.) This lead was followed.

Marquette's losses in 1932 were not unique. Other Companies selling in the same marketing area were in similar positions.[94]

Another example in later years was Marquette's unsuccessful attempt to increase its delivered prices in May, 1937. Marquette's competitors failed to follow this price lead and Marquette was compelled within a few days to lose business or reduce its delivered prices to meet the competition in the field. Marquette reduced its quotations.[95]

Two months earlier Marquette had attempted to increase its prices around its Cape Girardeau plant. This increase was followed by competitors. When the Complaint was filed, Marquette was still using this new constant figure in computing its prices from this plant. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,999-40,002, R. 12,200-2; Commission's

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[94] Commission's Witnesses: Hartley, Tr. 12,751-2, R. 4,478-9; Tr. 12,769, R. 4,486; Royal, Tr. 19,527, R. 6,185; Tr. 19,541-6, R. 6,186-7; Defendant's Witnesses: Coogan, Tr. 24,591-2, R. 7,316-7; Fellows, Tr. 26,626-7, R. 7,554-5; Bowen, Tr. 26,896-8, R. 7,922-3; Tr. 26,925, R. 7,936; Davis, Tr. 29,559, R. 8,707; Ackerman, Tr. 31,239-41, R. 9190; Hogan, Tr. 34,651, R. 10,225-6; Stone, Tr. 35,293-5, R. 10,552-3; Alexander, Tr. 37,304, R. 11,279; Tr. 37,375-6, R. 11,300-2; Resp. Ex. 22 A-B, 61 A-C, 85.

[95] Defendant's Witnesses: Coogan, Tr. 24,640-3; R. 7,340-1; Lucas, Tr. 38,701, R. 11,769-70; Colburn, Tr. 39,049-50, R. 11,886-7.

Witness Parsons, Tr. 5,058, R. 2,178; Commission's Ex. 96 b.)

Marquette's Freight Rate Books.

Marquette has been making its own freight rate books for 25 years; Commission's Exhibit 2609 is a typical Marquette freight rate book. (Commission's Witness Wecker, Tr. 14,074-5, R. 4,887-88; Commission's Witness Reiter, Tr. 4,059, R. 1849.) Marquette's freight rate book is made up from the published tariffs of the different railroads. It shows freight rates to all destination points where Marquette wants to sell cement, and also shows all of the different mills with which Marquette is likely to compete. (Commission's Witness Wecker, Tr. 14,034, R. 4,875.)

Marquette does not check or compare its freight rate books with the freight rate books of the Cement Institute and has never used the Cement Institute freight rate books. (Commission's Witness Wecker, President of Marquette, Tr. 14,035, R. 4,876; Respondents' Ex. 92.) Marquette has no agreement or understanding with any other cement manufacturer or with the Cement Institute or any one else concerning freight rates or freight rate books. (Defendants' Witness Colburn, Vice-Pres. of Marquette, Tr. 39,051-2, R. 11,887-88.)

Marquette's freight rate books merely compile in usable form the official published tariff rates which apply to the movements of portland cement to destinations in which Marquette is interested. (Commission's Witness Wecker, Tr. 14,034, R. 4,875; Commission's Ex. 2,609.)

Marquette Practices Relating to Diversions in Transit.

Marquette always refused to allow diversions of shipments. As to the provisions of the N. R. A. Code declaring diversions unfair trade practice, Marquette did not think it should be covered by the Code. Marquette did not collaborate or cooperate with anybody with regard to the matter of diversion. (Defendants' Witness Colburn, Vice-Pres. of Marquette, Tr. 40,007-8, R. 12,204-05; Tr. 39,051-2, R. 11,887-88.) Marquette has always pursued the policy of affording its dealers full protection. (Defendants' Witness Colburn, Vice-Pres. of Marquette, Tr. 39,040, R. 11,880-81; Respondents' Ex. 2991.)

Origin of Marquette's Terms of Sale and Discounts.

Marquette has always independently established its own prices, terms of sale, discounts and methods and means of marketing its product. (Defendants' Witness Colburn, Vice-Pres. of Marquette, Tr. 39,049, R. 11,886; Tr. 39,051-2, R. 11,887-88.) Certain provisions have long been established in the trade as a custom of the trade. For example, provisions as to cash discounts dated from 1926. (Respondents' Ex. 2979, 2484.) The custom of giving a five-day notice to dealers, dates to 1914. (Defendants' Witness Moore, Tr. 47,038-9, R. 14,742-43.) Credit for freight on return of sacks goes back to 1920. (Defendants' Witness Brooke, Tr. 42,248, R. 12,949.)

Membership of Marquette in the Institute.

In the spring of 1933 Marquette was advised that a code of fair competition for the Portland cement industry was being formulated under the provisions of the National Recovery Act and that other members of the industry were joining the respondent Cement Institute, which was in charge of formulating the Code, and that it would be for Marquette's best interests to join the Institute to protect its interests in the formulation of the Code. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,033, R. 11,876-77; Respondents' Ex. 2,988, 2,989 A-H. Statement by Counsel for Commission, Tr. 33,912, R. 10,028.) June 15, 1933, Marquette applied for membership in the Institute, subject to its approval of the Code. (Defendants' Witness Colburn, Vice Pres. of Marquette, Tr. 39,032-4, R. 11,875-77; Commission's Witness Wecker, Tr. 13,969-70, R. 4,849-50.) The articles of association submitted to the respondent, Marquette Cement Manufacturing Company, in the spring of 1933, before it became a member of the Institute, were the same as Respondents' Ex. 2989. They were subsequently amended as of December 11, 1935, as shown in Commission's Ex. 561.

Marquette continued its membership in the Institute after the decision in the Shechter case in 1935, because there was talk at that time of a new Code and new regulatory measures by the Government and its executives considered it should remain a member in order to protect its interest should any such thing arise. (Commis-

sion's Witness Wecker, Pres. of Marquette, Tr. 14,065-66, R. 4,885-6; Commission's Counsel Wooden, Tr. 4,174, R. 1,897; Respondents' Ex. 31.)

In 1936 Marquette ceased to pay dues to the Institute as required in the articles of association, but expressed its willingness to pay dues on some other mutually agreeable basis and asked for a proposal. (Respondents' Ex. 90.) Marquette never received any proposition from the Institute, as suggested, as to the payment of dues on any other basis and did not thereafter receive any such statement or bill from the Institute. (Commission's Witness Wecker, Tr. 14,069, R. 4,887.)

Marquette formally resigned as a member of the Institute on the 22nd of April, 1938 (Respondents' Ex. 93; Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,037, R. 11,878-79).

Institute Had No Influence on Marquette's Pricing, Marketing Methods, or Manufacturing Policies.

The Institute did not influence or control Marquette in carrying out any method of pricing, bidding or marketing cement, except in so far as during the Code Period Marquette made price filings with the Code Authority which was selected through the Institute and received price filings therefrom, and for a few months in 1935 after the Code Authority ceased to function Marquette received price filings from the same group who were styled "The Trade Practice Committee." This practice was entirely discontinued prior to the end of 1935 and never again undertaken.

(Commission's Witness Wecker, President of Marquette, Tr. 14,076-7, R. 4,888-9; Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,037-8, R. 11,878-9; Commission's Ex. 991.)

Marquette has always formulated its own prices and policies. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,049, R. 11,886; Tr. 39,051-2, R. 11,887-8; Commission's Witness Wecker, President of Marquette, Tr. 14,004, R. 4,859-60.) Marquette has never referred any question of policy to the Institute or division office thereof. Marquette has not in any way used the Institute meetings or the officials, committees or bodies of the Institute, to promote any system of pricing or policy of selling cement. Marquette is not a member of any sectional or local group of producers. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,038, R. 11,879-80.)

Marquette's Relationship to the Code of Fair Competition Under N. R. A.

Marquette had immediate objections to the proposed Code. (Commission's Witness Wecker, Tr. 13,971, R. 4,850; Defendants' Witness Colburn, Vice President of Marquette, Tr. 40,006-7, R. 12,203-5; Commission's Ex. 2603 A-E.) Marquette's position was that the N. R. A. Code should cover wages and hours of employment only. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 40,006, R. 12,203-4; Commission's Ex. 2629, p. 2; Commission's Counsel Wooden, Tr. 14,517-520, inclusive, R. 5,046.)

Marquette never at any time entered into any combination, agreement, conspiracy or arrangement, directly or indirectly, with any other person, firm or corporation, for the adoption, retention or establishment of (a) either the Code for the Portland cement industry; (b) or any provision in the N. R. A. Code of the Portland cement industry. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,036, R. 11,878.)

Marquette objected to the price provisions of the Code as restraining its independence. (Commission's Witness Wecker, Tr. 14,000-3, R. 4,858-9; Commission's Ex. 2603-B.) Marquette's objections of August 9, 1933, were to the proposed Code as a whole, to reports of confidential information, to inclusion of any plan for control of production, allocation of business, fixing of prices, and to any dictatorial control being vested in the Code Authority. (Commission's Ex. 2603 A-F; see also Commission's Ex. 556, printed copy of proposed Code; Commission's Witness Wecker, Tr. 14,064, R. 4,885.)[96]

In September, 1933, Marquette filed a printed brief with the N. R. A. objecting to the proposed Code as modified, particularly as to inclusion of any plan for controlling either production or allocation of business

[96] Marquette specifically objected to inclusion in the Code of any provision for determining prices, stating:

> "We must retain for ourselves the right to prescribe a course of action which to us seems imperative under circumstances such as might arise from time to time." (Commission's Ex. 2603 A-F.)

and any authority of the Code Authority to regulate or approve price changes. (Commission's Ex. 2629.)

The Code was approved by the President on November 27, 1933. (Commission's Ex. 557.)

Marquette advocated modification of the Code and in January, 1934, filed with the N. R. A. a petition for modification specifically so as to grant the right to sell state governments "under contracts for delivery periods as specified in formal requests for bids," prohibited by Article XI. (Commission's Ex. 2630; Commission's Counsel Wooden, Tr. 14,517-8, R. 5,046.) Following this petition for modification Article XI was suspended and was never restored. (Commission's Witness Murray, Tr. 85-88, R. 377-9.)

Under the code the cement producers were required to, and did, make a change in the marketing method which they had followed before the code was adopted, in that they were required to file with the Code Authority the prices that they quoted and to adhere to these quotations and to the prices so filed. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,979-80, R. 12,188-9.) However, price changes were not inhibited so long as they were filed with the Code Authority. This method of pricing was what is commonly known as the "open price method."

Marquette Did Not Use a Control Clause as Means of Depriving Government of Benefit of Land Grant Rate.

The so-called control clause was filed by a competitor with the Code Authority during the Code days. Mar-

quette was informed of the control clause by the Code Authority as provided by the Code. (Defendants' Witness Koch, Tr. 32,724, R. 9,589.)

During the Code days the only price Marquette could quote was the price that was on file with the Code Authority. Marquette had on file a mill price for quoting to the U. S. Government. If Marquette's filed mill price plus the lowest land grant or special rate that Marquette could find, was less than the destination cost price filed by someone for the particular letting, then Marquette quoted its mill price to the Government, but where Marquette found that its mill price, plus the lowest freight, would be higher than the filed price, then Marquette used the filed destination cost price. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,979, R. 12,188; Tr. 39,980-1, R. 12,188-90.)

The few times Marquette bid a destination cost price with the control clause, the Government in each case received a better price than Marquette's filed f.o.b. mill price. (Defendants' Witness Colburn, Vice President of Marquette, Tr. 39,981, R. 12,189-90.)

Marquette has at all times cooperated with and aided the U. S. Government in obtaining the maximum benefit of land-grant rates, and has not in any way thwarted or attempted to thwart the efforts of the United States Government officials to secure f.o.b. mill prices. (Defendants' Witness Colburn, Vice-President of Marquette, Tr. 39,035-6, R. 11,877-8; Respondents' Ex. 19-K.)

Marquette Did Not Agree to Classify Customers Nor to Limit Sales to Certain Dealers.

Marquette never at any time entered into any combination, agreement, conspiracy or arrangement, directly or indirectly, with any person, firm or corporation, for the adoption, retention or establishment of any plan, establishing, requiring, or arranging in any manner any division or classes of customers or purchasers of portland cement or dividing such customers into classes of those who were to be sold cement directly and those to whom cement producers would be prohibited from selling directly. (Defendants' Witness Colburn, Vice Pres. of Marquette, Tr. 39,036, R. 11,878.) Marquette opposed any inclusion in the Code of a provision for the classification of customers. (Commission's Ex. 2603 A-F, 2629.)

Marquette opposed the Lehigh Portland Cement Company's plan in 1930 of rewarding dealers at so much per barrel at the end of the year. Marquette at that time deemed it of importance to advise its dealers and about November 18, 1930, sent to all dealers in its territory a circular letter relating to Marquette continuing its policy of affording its dealers full protection. (Defendants' Witness Colburn, Vice Pres. of Marquette, Tr. 39,040, R. 11,880-81; Tr. 39,989, R. 12,194; Respondents' Ex. 2991.)

Marquette did not attend meetings in the winter and spring of 1935 at which the subject of direct sales was discussed with representatives of dealers or representa-

tives of competitors. (Defendants' Witness Colburn, V. P. of Marquette, Tr. 39,983, R. 12,190-91.) Marquette has never combined or agreed with anyone to limit its sales to any particular individuals nor has it agreed or combined with anyone as to the definition of a class of customers to whom Marquette would make direct sales; Marquette has never been restricted by an agreement or understanding as to the parties to whom it would or would not sell cement. (Defendants' Witness Colburn, Vice Pres. of Marquette, Tr. 39,052, R. 11,888.)

Where necessary to meet competition, Marquette has sold directly instead of to the dealer. (Defendants' Witness Alexander, Tr. 37,409-10, R. 11,317-19; Commission's Ex. 731-6F.)

Meetings Attended by Marquette Representatives.

The meetings attended by representatives of Marquette were within the period beginning June 15, 1933, and subsequent thereto. Principally these meetings referred to the formulation of the N.R.A. Code or the modification thereof.[97]

[97] Respondents' Ex. 2173-A, Minutes Trustees, Cement Institute, June 15, 1933; District Meeting of Cement Institute, June 23, 1933, Commission's Ex. 828-6T through 7H; Commission's Ex. 606 A to J, Minutes of Institute Trustees, June 27, 1933; Commission's Ex. 608-A through 608-O, purported minutes of Institute Trustees, August 15, and 16, 1933; Commission's Ex. 597-A through D, Minutes of Industry members March 14, 1935; Commission's Ex. 623-A through C, Minutes of Meeting, Cement Institute Trustees, June 10, 1935; Commission's Ex. 603-B through D, purported minutes of Meeting of Institute, June 19, 1936.

In addition there was a meeting of the Trustees of the Institute called for the purpose, among other things, of discussing Marquette's letters relating to ceasing to furnish statistical information, which the President of Marquette refused to attend, as shown by Commission's Ex. 1025-L.

The one other meeting attended by Colburn, Vice President of Marquette, was December 15, 1935. Colburn was invited to attend this meeting without his knowing the nature of it. He stayed only a few moments hearing only Mr. Johnson haranguing Mr. Cree and a Mr. Lingeman about the unprofitable investments and policies of Aetna. (Defendants' Witness Colburn, Tr. 39,041-2, R. 11,881-2.) Marquette was not a regular competitor of the Aetna Company and had no interest in the internal affairs of that company. (Defendants' Witness Colburn, Tr. 39,041, 39,042, R. 11,881-2.)

Marquette Always Objected to Any Report to Competitors of Its Confidential Business Statistics

Marquette had always objected to exposing confidential information as to its statistical records of production and sales.[98]

During the Code Period, Marquette furnished to the Code Authority or the Institute such statistical information as it was required to furnish by the Code, and it continued to do so after the discontinuation of the Code during the interim period when there was a pros-

[98] Commission's Witness Wecker, Tr. 14,063, R. 4-884-5; Commission's Ex. 2610-A to C.

pect of the formulation of a new Code. In 1936, its officers and executives concluded that there was no immediate likelihood of the adoption of a new form of N.R.A. Code for the industry, and in accordance with the policies it had theretofore followed in the matter of keeping confidential the details of its business, Marquette ceased to send to the Institute any further statistical information.[99]

When it appeared to the executives of Marquette that if it continued to furnish statistical information to the U. S. Bureau of Mines, it might be an indirect method of disclosing information to the industry, Marquette refused to continue to furnish such information to the Bureau of Mines.[100] Marquette did not thereafter receive any more statistical information from the Institute. (Commission's Witness Reiter, Tr. 4,419, R. 1,987; Commission's Ex. 1025-O; Commission's Witness Wecker, Tr. 14,069, R. 4,887.)

Marquette did not desire its competitors to know the details of its business nor did it desire to know the details of its competitors' business but desired to run its own business in its own way. (Defendants' Witness

[99] (Commission's Witness Wecker, Tr. 14,043, R. 4,879; Respondents' Ex. 89 and 90; Commission's Ex. 1025-C through E, letter to Institute, July, 1936; 1025-F, 1025-G and H, 1025-J and 1025-L, Defendants Witness Colburn, Tr. 39,037, R. 11,878-9; Commission's Witness Reiter, Tr. 4,418, R. 1,987.)

[100] (Defendants' Witness Colburn, Tr. 39,037-8, R. 11,878-80; Commission's Ex. 2908; Commission's Witness Wecker, Tr. 14,063, R. 4,884-5, Commission's Ex. 1025-J.)

Colburn, Tr. 39,984-5, R. 12,191-2; Commission's Ex. 1025-G, H.)

Respectfully submitted,

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October 2, 1947.